Nos. 89-388, 89-403 and 89-552

IN THE

Supreme Court of the United States

October Term, 1989

THE CITY OF NEW YORK, *et al.*,
Petitioners,

against

SEAWALL ASSOCIATES, *et al.*,
Respondents.

THE COALITION FOR THE HOMELESS,
Petitioner,

against

SEAWALL ASSOCIATES, *et al.*,
Respondents.

RICHARD WILKERSON, *et al.*,
Petitioners,

against

SEAWALL ASSOCIATES, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the New York State Court of Appeals

BRIEF IN OPPOSITION OF RESPONDENT SEAWALL ASSOCIATES

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Respondent Seawall Associates ("Seawall") respectfully urges that this Court deny the petitions for a writ of certiorari,

seeking review of the opinion of the New York State Court of Appeals.[1]

COUNTERSTATEMENT OF THE CASE

Seawall will not respond here to the many misstatements and references to matters *dehors* the record in the descriptions of the case contained in the three petitions, except to note that it takes issue with the petitioners' argumentative presentations of the facts herein. Because the relevant provisions of New York City Local Law 9 of 1987 ("Local Law 9"), which was declared unconstitutional in the judgment sought to be reviewed, as well as the relevant underlying facts of this case, are adequately stated in the published opinions of the Supreme Court, New York County, the Appellate Division and the Court of Appeals, Seawall respectfully refers this Court thereto. *See Seawall Assocs.* v. *City of N.Y.*, 134 Misc. 2d 187, 189-92 (Sup. Ct. N.Y. Co. 1986) (Saxe, J.) (omitted from the City's Appendix); *Seawall Assocs.* v. *City of N.Y.*, 138 Misc. 2d 96 (Sup. Ct. N.Y. Co. 1987) (Saxe, J.) (*see* A-166-183); *Seawall Assocs.* v. *City of N.Y.*, 142 A.D.2d 72 (1st Dep't 1988) (*see* A-109-142); *Seawall Assocs.* v. *City of N.Y.*, No. 127, slip op. (N.Y. July 6, 1989) (*see* A-2-10).

REASONS WHY THE PETITIONS SHOULD BE DENIED

1. This Court is Without Jurisdiction to Hear This Case

This Court has long recognized that it does not possess jurisdiction to review state court decisions rendered on the basis of independent and adequate state constitutional grounds, even though federal questions may also be involved in the case. *See*

[1] Opinion reprinted in the Appendix to the Petition of the City of New York, *et al.* (the "City's Petition") at page A-1. Parenthetical citations preceded by "A" refer to the Appendix to the City's Petition; those preceded by "R" refer to the first and second volume of the Record on Appeal filed in the Court of Appeals; and those preceded by "SR" refer to the third volume of the Record on Appeal (which had been denominated "Supplemental Record" in the Appellate Division).

Fox Film Corp. v. *Muller*, 296 U.S. 207, 210 (1935); *see also Harris* v. *Reed*, _ U.S. _, 109 S. Ct. 1038 (1989). As long as the state court has made a "plain statement" indicating that there is an independent and adequate state law ground for its opinion, this Court does not have the power to hear the appeal. Thus, in *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court declared that, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041.

In several specific instances, the opinion of the New York State Court of Appeals adequately and independently relied on New York State constitutional requirements, independent of federal constitutional law, in striking down Local Law 9. (*See, e.g.*, A-3, A-5, A-9-10, A-12, A-61-63 (particularly at fn. 15) and A-65-66.) In these circumstances, even if the Court of Appeals' ruling with respect to the federal questions presented were arguably wrong, it would be superfluous, because the same judgment would plainly be rendered by the State court in this case *even if* its view of federal law were to be "corrected" by this Court, thus reducing any review by this Court to "nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945).

Significantly, the Court of Appeals, in footnote 15 of its opinion, underscored the rule that the takings clause of the New York State Constitution need *not* be interpreted in the same manner as this Court has interpreted the federal takings clause—*i.e.*, the protections granted property owners by Article 1, section 7 of the State Constitution may be *broader* than those guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution.[2]

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[2] While states are allowed freedom to adopt and enforce their own constitutions and statutes, this Court has made clear that the requirements of the U.S. Constitution establish the "minimum" protection to which all are entitled. *Mills* v. *Rogers*, 457 U.S. 291, 300 (1982). Thus, the freedom which the states enjoy, and which the New York Court of Appeals could properly have exercised in this

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The Court of Appeals noted, however, that since, in this case, it had expressly and plainly found Local Law 9 to be facially invalid under *both* the federal and the state constitutions, it did "not [need to] decide the extent of which, if at all, the protections of the 'takings clause' of the New York State Constitution differ from those under the Federal Constitution." (A-63 fn. 15.) Thus, if this Court were to find that the Court of Appeals misconstrued the federal Constitution, that conclusion would be academic in terms of this case. The Court of Appeals is the final arbiter of the New York State Constitution and there is no suggestion that its interpretation thereof violates the federal Constitution. Therefore, Local Law 9 is invalid as an uncompensated taking under the New York State Constitution, and there is an independent and adequate state ground for the Court of Appeals' decision. Footnote 15 of its opinion is a "plain statement" by the highest state court indicating that there is an independent and adequate state law ground for the decision, thus rendering any differences between the federal and state takings clauses irrelevant in this case. *See Michigan* v. *Long*, 463 U.S. at 1041.[3] As a result, there is no jurisdictional basis for Supreme Court review herein, and the petitions should accordingly be denied.

2. This Court's Prior Decisions Concerning the *Per Se* Physical Taking Doctrine Fully Support the Decision Below

The Court of Appeals' holding that Local Law 9 would result in an invalid physical taking requiring compensation under the Fifth Amendment is *not* contrary to any of the decisions of this

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case if it had found such action to be necessary, is to provide *more* protection under the state constitution than the federal Constitution requires, not less. *See Joslin Mfg. Co.* v. *City of Providence*, 262 U.S. 668, 676-77 (1923); *see also PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 81 (1980).

[3] The petitioners' attempts to base *their* arguments (that there was *no* adequate and independent state ground) on this *very statement* is most curious indeed. (*See* City's Petition at 23; Petition of The Coalition for the Homeless (the "Coalition's Petition") at 19-20.)

Court which are pointed to by petitioners. (*See* City's Petition at 10-14; Coalition's Petition at 22-29, joined in on this point by the Petition of Richard Wilkerson, *et al.* ("Individual Intervenors' Petition") at 20.) As the carefully reasoned discussion (reproduced at A-12 through A-29) in the opinion itself demonstrates, the Court of Appeals properly applied the teachings of this Court's pertinent decisions in determining that a *per se* physical taking existed in this case. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987); *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979); *see also United States* v. *Causby*, 328 U.S. 256 (1946); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945); *United States* v. *Lynah*, 188 U.S. 445 (1903); *Pumpelly* v. *Green Bay Co.*, 80 U.S. 577 (1871); *cf. Bowles* v. *Willingham*, 321 U.S. 503 (1944). The "conflicts" perceived by petitioners between the above-cited decisions and that of the Court of Appeals in this case are strictly illusory.[4]

Firstly, the City's assertion of "conflict" as to the finding of a physical taking in this case relies primarily on its erroneous belief that so long as a law somehow affects "the landlord-tenant relationship," it is *ipso facto* immune from constitutional just compensation requirements. As the Court of Appeals correctly found, this theory is simply incorrect (*see* A-23-27). The very purpose of the "rent-up" provisions of Local Law 9 (*see* A-6-7) is to attempt to *create new* landlord-tenant relationships where none exist. *Existing* landlord-tenant relationships, on the other hand, are wholly governed by different and independent New York laws—Local Law 9 is an entirely different category of regulation.

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[4] Other cases cited in the petitions are either manifestly inapposite in this regard or are not controlling as binding precedent in this case. *Cf., e.g., Pennell* v. *City of San Jose*, 485 U.S. 1 (1988); *Callahan* v. *Fresh Pond Shopping Center, Inc.*, 388 Mass. 1051, 446 N.E.2d 1060, *appeal dismissed*, 464 U.S. 875 (1983); *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958).

The decisions relied upon by the City are sharply distinguishable from the present case. For example, this Court did *not* subject the rent control law challenged in *Pennell* v. *City of San Jose*, 485 U.S. 1, 108 S. Ct. 849 (1988), to a takings analysis at all. Rather, the majority merely held in *Pennell* that the ordinance at issue was not facially "irrational" under the "deferential" *due process* standard applicable in that case. *See id.* at 859.[5] The takings claims asserted in *Pennell* were felt by the majority of this Court to be premature (and were therefore not addressed at all) because, absent enforcement, there was no evidence that the challenged "tenant hardship" clause would ever actually be relied upon to reduce a rent below the figure it would have been set at on the basis of the other six (concededly valid) factors specified in the law.[6]

Similarly, the emergency wartime rent control statute upheld in *Bowles* v. *Willingham*, 321 U.S. 503 (1944), did *not*, as the City claims, "restrict landlords' ability to determine whether their residential properties [would] be rented." (City's Petition at 11.) That law merely set maximum rents in certain designated "defense rental" areas, and it explicitly provided that it did *not* re-

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[5] It is highly significant that, in *Pennell*, the challenged ordinance *did not* apply, by its own terms, "to the rental of a unit that has been voluntarily vacated" or "that is vacant as a result of eviction for certain specified acts," 108 S. Ct. at 854 n.2, and thus did not, in any event, share one of the most inherently invasive and confiscatory features of the local law at issue in this case. (*See* A-13-15, A-26.)

[6] Such a showing was found necessary in that case since, *inter alia*, under the San Jose ordinance, consideration of "tenant hardship" was to result in *permissive*, and not mandatory reductions in rent.

It is worth noting, nevertheless, that the six Justices joining in the *Pennell* majority opinion *explicitly* acknowledged the lack of a substantial causal nexus between the landlord's actions and the tenant's hardship (as required to overcome a taking claim under *Nollan*) in that case. *See id.* at 859. Seawall submits that, while the lack of any reasonable causal nexus was found by the majority to be "beside the point" in *Pennell*, for purposes of the deferential "rational relationship" test of due process analysis, it would be *quite* relevant, or even determinative, to any *takings* analysis under the newly applicable stricter test set forth in *Nollan*, in which this Court unequivocally heightened the standard of review. (*See infra* at pp. 24-25.)

quire "any person . . . to offer any accommodations for rent." *Id.* at 517. This stands in "sharp contrast" to Local Law 9, which requires respondents, against their will, to allow new tenants, previously unknown to them, to enter their property and take physical possession of it; thus acquiring possessory interests under other existing state rent control laws which are extraordinarily difficult, if not impossible, to sever and which can protect them indefinitely from eviction. (*See* A-26.) Any use of the real estate other than as an SRO is effectively forbidden by Local Law 9. In explaining why the law challenged in *Bowles* did *not* effect a "taking" of property, this Court emphasized that "[t]here [was] no requirement that the apartments in question be used for purposes which [brought] them under the Act." *Id.*

Respondents do *not* challenge the constitutionality of emergency rental housing legislation prohibiting the eviction of *tenants-in-possession* whose leaseholds have expired, which was first upheld by this Court in *Block* v. *Hirsh*, 256 U.S. 135 (1921), and which was *not* questioned by the Court of Appeals in this case. (*See* A-23-26.) However, the *Block* case and its progeny, relied upon by petitioners, have no bearing on the validity of Local Law 9's distinctly more onerous rent-up and fix-up requirements, which purport to compel Seawall and other owners of buildings containing (or formerly containing) SRO units to render derelict vacant units habitable (at considerable expense), and to accept total strangers as tenants of space which they desire to keep empty (or demolish and replace with other permitted uses). *See also Marcus Brown Holding Co.* v. *Feldman*, 256 U.S. 170 (1921); *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U.S. 242 (1922); *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948). (Also relied on in the Coalition's Petition at 31-35.)[7] The fact is that Local Law 9 is *not*

[7] Petitioners also repeatedly cite *Callahan* v. *Fresh Pond Shopping Center, Inc.*, 388 Mass. 1051, 446 N.E.2d 1060, *appeal dismissed*, 464 U.S. 875 (1983), as being binding precedent of this Court which supports their position. However, *Callahan* is an extremely weak "support" on which to rely, as it was "a case that

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classifiable simply as "landlord-tenant" regulation—indeed, it "adjusts" neither rents nor evictions, nor does it in any manner alter the landlord-tenant relationship under existing laws—and it is also plainly *not* merely a "restriction on use"[8]; but, to the contrary, deprives respondents of *all* use of their property except that imposed upon them, against their will, by the City. Indeed, even the City itself concedes that Local Law 9 "go[es] beyond traditional rent control [regulation]." (City's Petition at 21.)

Similarly, an entirely novel and utterly unsupported theory is posited by the intervenors-petitioners: that by grafting some undefined "personal privacy of use" requirement onto the Fifth Amendment's conception of protected "property," the "right to exclude others" may be made inapplicable to all "rental premises," and thus, to the case at bar. (*See* Coalition's Petition at 22-26, 44.) This proposition cannot withstand even cursory scrutiny. The Coalition (joined by the individual intervenors on this point) tries to "distinguish" such cases as *Nollan*, 483 U.S. at 825; *Kaiser Aetna*, 444 U.S. at 164; and *Loretto*, 458 U.S. at 419, on the ground that they involved "property reserved by [their] owners for personal private use" (Coalition's Petition at 22) while this case

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ha[d] produced no prevailing written opinion at any level. The trial court published no opinion, the Supreme Court of Massachusetts summarily affirmed the judgment by a tie vote (446 N.E.2d 1060), and [this] Court summarily dismissed a purported appeal for want of a substantial federal question. That scenario creates no persuasive, let alone binding, authority for anything." *Nash* v. *City of Santa Monica*, 37 Cal. 3d 97, 112-13, 688 P.2d 894, 905 (1984), *appeal dismissed*, 470 U.S. 1046 (1985) (Mosk, J., dissenting). In any event, the ordinance challenged in *Callahan*, like the other cases relied on by petitioners, only protected certain tenants-in-possession from eviction and did *not* mandate that vacant units be subjected to coerced new tenancies. *See Callahan*, 464 U.S. at 875 (Rehnquist, J., dissenting from dismissal and concluding that the ordinance was a taking without just compensation because it was the equivalent of a "physical occupation" of the landlord's property); *see also Flynn* v. *City of Cambridge*, 383 Mass. 152, 418 N.E.2d 335 (1981) (same ordinance); *Benson* v. *Beame*, 50 N.Y.2d 994, 409 N.E.2d 948 (1980), *appeal dismissed*, 449 U.S. 1119 (1981).

[8] As is argued in the Coalition's Petition at 29.

allegedly does not; and it inappropriately analogizes to Congress' right under its commerce power to enact legislation forbidding racial discrimination in places of "public accommodation" (*i.e.*, hotels, restaurants, theaters). *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964).[9]

In fact, the Coalition's argument proves too much—it is indeed *because* of the fact that respondents did *not* intend or desire to "open their property to the general public" that such cases as *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980) and *Heart of Atlanta Motel, Inc.*, 379 U.S. at 241, are utterly inapposite herein. *See Nollan*, 483 U.S. at 832 n.1 (distinguishing *PruneYard* on the ground, *inter alia*, that "there the owner had already opened his property to the general public").[10] Since, to the con-

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[9] *Heart of Atlanta*, in which this Court rejected a takings challenge to the Civil Rights Act of 1964 by a property owner who *voluntarily* operated a motel on his premises and actively solicited patronage therefor on a national basis but desired to continue to follow "a practice of refusing to rent rooms to Negroes," *id.* at 243, is utterly inapposite in the present context. Among other things, the taking claim in that case (summarily rejected by this Court in one sentence) was *not* treated as a "physical" taking claim at all but rather as a claim that the challenged law would operate as a *regulatory* taking by causing the owner economic loss (which claim was found to be invalid). *Id.* at 260-61. Obviously, if the owner of the Heart of Atlanta Motel had opted to go *out* of the motel business and wished to convert his property to other uses rather than give up his policy of racial discrimination, the Civil Rights Act would not (and could not) have compelled him to continue to rent rooms to *anyone* (and certainly could not retroactively have forced someone to whom he *sold* the property for redevelopment to continue the former use, as does Local Law 9 in this case).

[10] In *PruneYard*, the owner of a 21-acre shopping center visited by 25,000 patrons daily (which included 5 acres of parking and 16 acres containing walkways, plazas, sidewalks and buildings occupied by more than 65 shops, 10 restaurants and a movie theater) sought to prevent the exercise of free speech rights (protected under the California Constitution) to circulate petitions in one of its common areas. 447 U.S. at 77-78. This Court correctly noted that the fundamental test of whether state enforcement of the free speech rights of others effected a "taking" of the shopping center owner's core property right to exclude others "requires an examination of whether the restriction on private property 'forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 82-83 (quoting *Armstrong* v *United States*, 364 U.S. 40, 49 (1960)). Because it was clear in that case that the

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trary, respondents in this case never intended to "open their property to the general public" but rather, expressly intended to vacate the properties and convert them to other uses (*see* SR-8-9, SR-15), Local Law 9's destruction of their right to exclude others constitutes a compensable taking.[11]

Further, this argument ignores the fact that *Loretto itself* was a case involving rental premises (an apartment house), *not* property reserved for Mrs. Loretto's "personal private use" (and also involved regulation arguably impacting on the "landlord-tenant relationship"). This Court made clear in that case that the physical occupation analysis applies equally to rental property as it does to any other property—observing that there was no reason "why a physical occupation of one type of property but not another type is any less of a physical occupation." *Loretto*, 458 U.S. at 439. Moreover, it is difficult to see how the *Kaiser Aetna* case, 444 U.S. at 164, involving the development by Kaiser Aetna (a commercial real estate developer, like respondents), as lessee

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owner could adopt "time, place, and manner regulations" that would minimize any interference with its chosen use of the property as a public shopping center, this Court found "nothing to suggest that preventing [the owners] from prohibiting th[at] sort of activity [would] unreasonably impair the value or use of their property as a shopping center." *Id.* at 83. Thus, under the particular circumstances presented, it held that there had clearly not been an unconstitutional taking in that case, and its decision was limited to the type of shopping center involved in that case. *See id.* at 96 (Powell, J., concurring in part and in the judgment).

[11] It must be noted that this argument is, in effect, focusing on a "regulatory taking" analysis of the owners' "investment-backed expectations" of keeping their property "private" (as opposed to being "open to the public"). Respondents' reasonable investment-backed expectations when they bought these former SRO properties—that they could *exclude* the general public from their property and convert it to other private uses—are in fact highly relevant to the regulatory taking analysis herein. *See infra* at note 19. However, such an analysis is *inherently inappropriate* in the context of a *per se* taking determination based on a physical occupation, where, this Court has long made clear, the Constitution requires just compensation *regardless* of the trivial size of the "taking," the state interests involved, or the "reasonableness" of the owner's expectations of a rate of return on the property. *See Nollan*, 483 U.S. at 831-32 (quoting *Loretto*, 458 U.S. at 434-35).

from the owner, of a 6000-acre residential subdivision, housing approximately 22,000 tenants and including at least 1,500 marina waterfront lot leases, additional non-waterfront lot leases, accommodations for pleasureboat owners who were not residents of the development but who paid fees for boating rights, and an on-site shopping center, *id.* at 167-68, can be construed by petitioners as involving property "reserved by its owners for personal private use."

When Seawall acquired its nearly vacant SRO properties in 1984, at a cost of millions of dollars, it did so with the intention of demolishing the buildings located thereon and erecting a major office tower on the site, in midtown Manhattan. (SR-8-9; *see* A-208-209.) It was Seawall's intention (and legal right) at the time it acquired the properties to reach arrangements with the few remaining tenants to vacate those units that were still occupied.[12] Instead, Local Law 9 would require that the few currently occupied units, plus the majority of now-vacant rooms, be kept in perpetual SRO occupancy at controlled rents, thus enlisting Seawall, against its will, in a business it had, and still has, no desire to be in. (SR-15.) Certainly, it never intended nor expected to be in the business of providing "public accommodations."

Petitioners further argue that under *Loretto*, 458 U.S. at 419, there is no physical taking resulting from Local Law 9 because "the owners retain the right to choose their tenants." (City's Petition at 12-13.)[13] This is an utterly meaningless "distinction" under

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[12] The record demonstrates that Seawall's purpose in acquiring its SRO properties for demolition and redevelopment was fully consistent with applicable law and supportive of the City's then existing housing policy, which sought to encourage the elimination of SRO housing. (*See* SR-567-71.)

[13] The City relies for this proposition on dicta contained in footnote 19 of the *Loretto* opinion, in which this Court noted that "the statute *might* present a different question" if it provided for the landlord's ownership of the cable installation, rather than for its ownership and control by the third-party CATV company. 458 U.S. at 440 n.19 (emphasis added) (*see* City's Petition at 12; *see also* Coalition's Petition at 28-29). Significantly, however, the City ignores the

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Loretto, which was properly rejected by the Court of Appeals. (A-26-27.) If Mrs. Loretto had been given complete freedom of choice as to *which* CATV companies could install their cables on her building against her will (rather than having the City decide which company would be granted the exclusive franchise to provide CATV in her neighborhood), the physical occupation resulting from the City's law requiring that she allow their intrusion on her property would clearly have been no less a taking. *See Loretto*, 458 U.S. at 424.

Finally, as to the assertions by petitioners that because Local Law 9 is "temporary in duration," it cannot effect a physical taking (City's Petition at 13-14; *see also* Coalition's Petition at 27-28, 33 n.13, 37 and 44), they are based upon a misinterpretation of long-standing eminent domain law and a blatant denial of the reality of the practical effects of Local Law 9, *in conjunction with other existing New York State laws*, upon respondents. The fact is that the operation of Local Law 9's rent-up provisions would compel Seawall to give up possession of its buildings to strangers (*i.e.*, new tenants) *indefinitely*, and perhaps forever, regardless of the fact that the Local Law purports to require legislative "extension" every five years. Firstly, as has consistently been ignored by petitioners, all new tenants will obtain possessory interests protecting them from eviction (as well as limiting their rents) under existing New York rent control or rent stabilization laws, which are often,

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Court's explanation in that same footnote of *why* the landlord's ownership of the cable might make a difference, *i.e.*, because then, "if the landlord wished to repair, *demolish*, or *construct* in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable." *Id.* (emphasis added). In the present case, by contrast, once *any* new tenant gains occupancy rights, Local Law 9, together with other laws, deprives the owner of the ability to deal with his property as he chooses. The significance placed by the *Loretto* Court on burdens placed by legislation upon a landlord's core property rights to demolish and/or construct buildings on his or her property is clearly relevant in the present case. *See also Nollan*, 483 U.S. at 833 n.2 ("[T]he *right* to build on one's own property . . . cannot remotely be described as a "government *benefit*".) (emphasis added).

practically speaking, *impossible* for a landlord to sever once acquired,[14] *even if* the Local Law itself were to expire after five years without renewal. Secondly, in considering the potential life-span of this law, which could be extended every five years upon a finding of "necessity," the New York experience with 46 years of annual renewal of "emergency" rent control laws teaches that this so-called "stop-gap" measure must be deemed to be, essentially, of unlimited duration.[15]

3. This Court's Prior Decisions Fully Support the Determination Below That Local Law 9 is Facially Invalid As A Regulatory Taking

Petitioners essentially propose that, under the decisions of this Court, there are *never* appropriate factual settings for the determination of facial regulatory taking claims. (*See* City's Petition at 14-17; Coalition's Petition at 37-39; Individual Intervenors' Petition at 21-27.) They are plainly wrong. This Court's concern with "ripeness" in certain takings cases, stemming from the general rule that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary," *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981) (citations omitted), is based upon the fact that the federal courts, as courts of limited jurisdiction, must, under the "case or controversy" provision of the federal Constitution, decide only "concrete legal issues, presented in actual cases" where there has been "actual interference" with

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[14] Under rent control and rent stabilization laws, the vacating of dwelling units by their occupants usually occurs only through the slow process of attrition by death, changed circumstances causing a willingness to move, or through a negotiated buy-out for significant consideration paid to the tenants.

[15] It should be noted that the suggestion by petitioners that there can be no such thing as a temporary physical taking (*see* City's Petition at 13-14) is, in any event, manifestly incorrect. *See, e.g., United States* v. *Pewee Coal*, 341 U.S. 114 (1951); *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949); *United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945) (all dealing with questions of just compensation for temporary physical takings).

someone's rights. *Beacon Hill Farm Assocs.* v. *Loudoun County Bd. of Supervisors*, 875 F.2d 1081, 1082 (4th Cir. 1989) (quoting *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-90 (1947)). Such "ripeness" concerns are *only* relevant in takings cases which are predicated upon an "*as-applied*" challenge to legislation. *See, e.g.*, *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186-87 (1985); *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980). There is no question that this case, by contrast, presented a *facial* challenge to Local Law 9.[16]

Indeed, petitioners concede that the only issue properly before the Court of Appeals on this facial takings challenge was "whether the 'mere enactment' of the [regulation] constitute[d] a taking" of respondents' property. *Hodel* v. *Virginia*, 452 U.S. at 295 (quoting *Agins*, 447 U.S. at 260). (*See* Coalition's Petition at 38; Individual Intervenors' Petition at 22.) As this Court made clear as long ago as *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926) (relied on by petitioners herein) there is no problem of ripeness implicated by a property owner's failure to seek some allegedly available administrative exemption from a land-use regulation before bringing suit challenging its constitutionality, where the claim asserted is facial—*i.e.*, that "the ordinance of its own force operates greatly to reduce the value of the [plaintiff's] lands and destroy their marketability" or that "the existence and maintenance of the ordinance in effect constitutes a present invasion of [the plaintiff's] property rights and a threat to continue it." *Id.* at 386 (emphasis added).[17] As recently as 1987, this Court has

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[16] In any event, Article III surely could not be said to have barred, on "ripeness" grounds, the New York *State* Court of Appeals from determining the facial challenge made to Local Law 9 herein under the state Constitution.

[17] It is highly significant to note that, in approving the propriety of facial attacks on land-use restrictions as confiscatory in the *Euclid* case, this Court defined the cause of action in terms of an ordinance's mere existence effectively constituting a present invasion of *the plaintiff's property rights* and operating to greatly reduce the value of *the plaintiff's lands*. *Id.* Clearly, such a plaintiff need *not*, as petitioners urge, prove that the challenged regulation also constitutes a present invasion of the property rights of each and every other landowner who may be

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reaffirmed that, notwithstanding its reluctance to render opinions on the constitutionality of land-use ordinances *as applied*, prior to their actual application to a specific piece of land, *see, e.g.*, *Williamson County*, 473 U.S. at 186-87; *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 348-49 (1986), a landowner *may* nevertheless properly "mount a facial attack on a land use regulation without first seeking a final determination of how the applied regulation will effect actual use of the property." *Beacon Hill Farm Assocs.* v. *Loudoun County Bd. of Supervisors*, 875 F.2d at 1084, (citing to *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 494 (1987)); *see also Loretto* v. *Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 138-39, 423 N.E.2d 320, 326 (1981), *rev'd on other grounds*, 458 U.S. 417 (1982) ("As has long been recognized, administrative remedies provided by a statute need not be exhausted prior to the bringing of an action which challenges the enactment 'in its entirety' as unconstitutional"). (*See* A-61-63 n.14.)

To the extent that petitioners argue that the facial invalidation of Local Law 9 as an uncompensated regulatory taking was premature because respondents had not applied for "hardship exemption" pursuant to § 27-198.2(d)(4)(b) of the New York City Administrative Code (*see* City's Petition at 27), they also misconstrue the very essence of Seawall's claim asserted below: that the so-called "hardship" provision is itself inherently confiscatory on its face, denying Seawall economically viable use of its land by its

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conceivably affected thereby, and petitioners' reliance for such a proposition on the wholly unrelated case of *United States* v. *Salerno*, 481 U.S. 739 (1987) (involving a challenge to the federal Bail Reform Act as violative of Eighth Amendment) is misplaced. (*See* City's Petition at 14, 16; Individual Intervenors' Petition at 22-23.) *See, e.g.*, *Hodel* v. *Irving*, 481 U.S. 704, 717 n.2 (1987) (statute facially invalid where each of the plaintiff's decedents "lost [a] stick in their bundles of property rights upon the enactment" thereof); *cf. Hodel* v. *Virginia*, 452 U.S. at 295-96 (facial takings challenge held ripe, but rejected on the merits where plaintiffs failed to identify any tracts of land which they owned which were alleged to be taken by the enactment at issue, and thus did not show required impact on *their own property*).

very terms.[18] The text of the hardship provision may be found in the Appendix at A-275 through A-279. Examination of its terms reveals that the purported "reasonable rate of return" that it allegedly "ensures" (*see* City's Petition at 15; Coalition's Petition at 40-41; Individual Intervenors' Petition at 13) is neither "reasonable" nor "ensured." (*See* A-56-57.) Most critically, it wholly excludes any consideration of the owner's *investment* in the property or its fair market value at the time of purchase. (*See* A-211-215.) In Seawall's case it is clear that its original purchase price is the appropriate measure of the property's value against which the "reasonableness" or "economic viability" of the return allowed by Local Law 9 must be measured. Seawall purchased its properties in October, 1984. At that time, the properties were zoned for commercial use (and still are), and there was no moratorium on demolition or conversion. Thus, Seawall had a *reasonable* investment-backed expectation of its ability to redevelop the properties as of right, which Seawall paid for, and which must rightly be considered.[19] By relying only on their current assessed value *as SROs*

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[18] As noted *supra* note 11, the existence of the "hardship" provision is irrelevant for purposes of the physical taking analysis herein. Moreover, as to their belated assertions of the need for further development of the record and the impropriety of the trial court's grant of summary judgment, petitioners are conveniently overlooking the plain fact that summary judgment was only granted by Justice Saxe below *after the City itself* moved therefor in "Action 2" of these consolidated actions (R. 858). It is hornbook law in New York that a motion for summary judgment "searches the record" and invites the court to award summary judgment to a nonmoving party where appropriate. *See, e.g., Lansing Research Corp.* v. *Sybron Corp.*, 142 A.D.2d 816, 819, 530 N.Y.S.2d 698, 701 (3d Dep't 1988) ("By initially seeking summary judgment, defendant exposed itself to a search of the record (*see*, CPLR 3212[b]; Siegel, NY Prac §282, at 239), and summary judgment could have been granted in favor of plaintiff even in the absence of its cross motion for the same relief.").

[19] This Court has made clear, in *Kaiser Aetna*, 444 U.S. at 175, that cases in which "distinct investment-backed expectations" are defeated by regulation present an especially sensitive category of takings, akin to that of permanent physical occupation. Particularly where a government's regulatory action sharply reverses its prior stance, upon which an owner justifiably relied in investing in some particular advantage that the challenged regulation would eliminate or destroy, this special category of takings analysis is implicated. *Id.* Recently,

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as the benchmark against which the "reasonable rate of return" is to be measured, the value of the hardship exemption is set at a point of absurdity. Thus, under Local Law 9's formulation, as is explained below, an owner could receive a "reasonable" return on the property *valued as an SRO*, but this would still not represent anything even remotely resembling a fair return on his initial investment. (*See* A-35-36, A-56-57 n.13.) This renders the legislative scheme inherently confiscatory.

The "hardship" provisions purport to give petitioner Commissioner of the City's Department of Housing Preservation and Development ("HPD") the power to entertain and grant applications to reduce in whole or in part the amount of the payment required under the buy-out provisions, or the number of replacement dwelling units required to be provided under the replacement exemption, *but only if* he finds: (i) that the owner cannot make a "reasonable" return unless the property is altered, converted or demolished as prohibited by the Local Law; (ii) that neither the owner nor *any prior owner* intentionally managed the property to impair its ability to earn such a return; *and* (iii) that the requirement that all SRO units be replaced would substantially impair the feasibility of developing the property for any other use.[20] Under this provision, it is apparent that those who

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in its opinion in *Keystone*, 480 U.S. at 470, a *facial* takings challenge, this Court reaffirmed the relevance of this special takings category and made clear that it is *not*, as petitioners urge, applicable solely where regulation is challenged "as applied." *Id.* at 495 (quoting *Kaiser Aetna*, 444 U.S. at 175); *see also id.* at 498; *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 226-27 (1986) (engaging in analysis of "interference with reasonable investment-backed expectations" in considering *facial* constitutionality of statute).

[20] The New York courts properly accepted Seawall's argument that the "hardship" provision is illusory due to the failure of the City to promulgate any regulations thereunder and the resulting unavailability of defined administrative procedures by which an affected property owner could seek partial or complete exemption from the Local Law's "buy-out" or "replacement" obligations. As an examination of the hardship provision clearly reveals, Local Law 9 itself provides *no* standards or guidelines for the exercise of the Commissioner's

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purchased old buildings in midtown Manhattan for site assemblage and office building construction are automatically excluded from "hardship" exemption, since almost *all* of those buildings were, prior to the passage of the law, operated with a view to permanently vacating the SRO units (in accordance with existing City policy and as the City then encouraged) and thereby "impairing" their usefulness as SROs. (*See* A-3, SR-567-71.)

The serious problem posed by the foregoing impediment to any "hardship" treatment, however, is dwarfed by the problem of the Local Law's definition of a "reasonable rate of return," which is defined in an inherently confiscatory way. The Court will note that Local Law 9 specifically states that "assessed value" is to be determined *without reference to any possibility of conversion or demolition.*[21] The Court of Appeals correctly recognized that to calculate a reasonable rate of return on the basis of an assessment that ignores the value of the property based on the as-of-right non-residential use (which the Local Law prohibits), is itself confiscatory.

And further, lest any owner seek a ray of hope in the assessment procedures of the City, in which assessments are systematically revised to reflect the enhanced purchase prices paid by

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discretion thereunder. (*See* A-53 n.12.) Indeed, there were no regulations at *all* under Local Law 9 until this case was already on appeal to the Court of Appeals, and the belated regulations that *did* purport to become effective on February 13, 1989, do not contain *any* procedures or guidelines whatsoever for the award of "hardship" relief.

[21] Local Law 9 provides:

> The term "reasonable rate of return" is defined to mean a net annual return of eight and one-half percent of the *assessed value of the subject property without recourse to the alteration, conversion or demolition prohibited by subdivisions a and c of this section.* If [HPD] determines that the assessed value of the subject property has increased as the result of the sale of such property, [HPD] *shall disregard the increase in the assessed value resulting from such sale to the extent that [HPD] determines that the amount paid for the property at such sale was in excess of the fair market value of the property on the date of the sale if the property continued to be used for single room occupancy rental housing* of the same type and quality after the sale.

(A-277-278) (emphasis added).

developers for underlying lots, the law states that HPD should disregard any increase in the assessed value resulting from a sale to the extent that it is determined that such increase is attributable to the potential for redevelopment. In such case, the value is to be determined instead as if the property would continue to be used as an SRO.

Since it is undisputed that, in determining hardship, the City intends to use an assessment irrevocably and unalterably fixed and limited to use of the property as rent-regulated SRO housing,[22] there would appear to be little doubt that HPD would have ample latitude under the Local Law to value the property low enough so that it would easily earn 8.5% of its "value" as an SRO.[23] Thus, Seawall would be forever condemned to conduct the SRO business. Conceivably, Seawall could sell the properties to a person content to engage in such activity, but such a sale would necessarily bring a price not too different from the value HPD would impose. Thus, the only way out of the municipal servitude improperly imposed by Local Law 9 might be abandonment of ownership or sale at a distressed price representing an insignificant fraction of what Seawall paid for the properties, in expectation of redevelopment, before the law was enacted.[24] The

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[22] For SRO units subject to rent stabilization, the New York City Rent Guidelines Board has awarded average increases for one-year leases of .8% per year over the past five years, while apartment rent increases averaged 5% per year. *See* N.Y.C. Rent Guidelines Bd. Hotel Orders Nos. 14-18; *cf.* N.Y.C. Rent Guidelines Bd. Apt. Orders Nos. 16-20.

[23] The City has conceded and acknowledged that real property in New York City is valued, for assessment purposes, at 45% of fair market value. Thus, the 8.5% return supposedly offered to owners is *not* 8.5% of their property's fair market value (as an SRO), but only 8.5% of 45% of fair market value, *i.e.*, 3.825% of market value (as an SRO). (*See* A-56 n.13.)

[24] Moreover, even abandonment would not permit an owner to escape the affirmative obligations of the Local Law, since an owner would be subject to substantial financial penalties for failure to comply. In the case at bar, Seawall would be obligated to pay penalties of almost $55,000 upon citation, if it fails to fix-up and rent-up its units within 30 days after the effective date of the law, and commencing ten days later, fines of $27,500 per day could be imposed.

ability to abandon or sell at such a huge loss provides no "cure" for the Local Law's constitutional defects.[25]

Petitioners rely upon inapposite cases to support their argument that the Court of Appeals' holding that Local Law 9 deprives respondents of economically viable use of their property conflicts with the decisions of this Court. For example, *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) and *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962) are both cases which fall within the long-standing "nuisance exception" to the constitutional just compensation guarantee, and are sharply distinguishable from the case at bar on that basis, since they involved classic and proper exercise of the states' police power to prevent activities that are tantamount to public nuisances.[26] Indeed, the nuisance exception was critical in determining the result in the case of *Keystone*, 480 U.S. at 470, as well. (*See* A-50-51.)

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[25] As to the alleged "buy-out" and "replacement" exemptions, the Court of Appeals correctly held that since "the effect of the moratorium and anti-warehousing measures is unconstitutionally to deprive owners of their basic rights to possess and to make economically viable use of their properties, merely allowing them to purchase exemptions from the law cannot alter this conclusion. In effect, the city, in the buy-out and replacement exemptions, is saying no more to the owners than that it will not do something unconstitutional if they pay the city not to do it. But if the initial act amounts to an unlawful taking, then permitting the owners to avoid the illegal confiscation by paying a 'ransom' cannot make it lawful." (A-54-55.)

[26] It should be noted that petitioners' reliance on such early cases as these and *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), is simplistic and inappropriate in this context, since, before *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), and the rest of the recent line of this Court's takings cases, the concept of determining whether the uses which remained to a property owner were "economically viable" did not yet exist—this concept "wasn't even mentioned by the Court until *Penn Central.*" Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 Urb. Law. 735, 762 (Summer 1988). Because the constitutional test in use prior to that time contained only the single requirement that land-use regulation be enacted for a proper public purpose, rather than including the alternative of deprivation of economically viable use, such early opinions have little value in the current context. *Id.* at 763. *See also Nollan*, 483 U.S. at 834-35 n.3 (noting that *Goldblatt* v. *Hempstead* is "inconsistent with the formulations of our later cases").

The case most often cited in connection with the nuisance exception is *Mugler* v. *Kansas*, 123 U.S. 623 (1887), in which the owner of a brewery alleged an unconstitutional taking of his property by an amendment to the state constitution prohibiting the manufacture and sale of intoxicating liquors. This Court held in *Mugler* that, since the distiller's use of his property had been validly declared by the constitutional amendment to be "injurious to the health, morals or safety of the community," no compensable taking resulted from the state's termination of this "noxious use of [his] property, [which] inflict[ed] injury upon the community." *Keystone*, 480 U.S. at 489 (quoting *Mugler*, 123 U.S. at 668-69).

As this Court explained in *Keystone*, however, this distinct type of state action to abate a public nuisance has a "special status" in takings jurisprudence, which:

> . . . can [be] understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.

Id. at 491 n.20.[27] The Court was careful to underscore the caveat that " '[t]he nuisance exception to the taking guarantee is not coterminous with the police power itself.' " *Id.* (quoting *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 145 (Rehnquist, J., dissenting)). Rather, it has long been recognized as a "narrow" exception, allowing the government the necessary latitude to prevent "a misuse or illegal use." *Curtin* v. *Benson*, 222 U.S. 78, 86 (1911) (*cited in Keystone*, 480 U.S. at 512 (Rehnquist, C.J., dissent-

[27] It must be noted, however, that this Court has *never* indicated that *all use* of an entire property could be prohibited without compensation based upon this theory, but rather, merely that a *particular activity* which constitutes a danger to others, or a "nuisance," may be prohibited.

ing)).[28] "It is not intended to allow 'the prevention of a legal and essential use, an attribute of its ownership.' " *Keystone*, 480 U.S. at 512.

Moreover, in contrast to the present case, the petitioners in *Keystone* lost on their facial regulatory taking claim because this Court found that they did not suffer any significant diminution in the value of their properties by reason of the challenged statute—there was simply no indication that the law made it impossible for them to profitably engage in their business or that there was any undue interference with their investment-backed expectations. *Id.* at 492-93. Significantly, this Court emphasized that the *Keystone* petitioners never even *claimed* that their mining operations were rendered unprofitable or commercially impracticable by the challenged law, and that, to the contrary, the record showed that, while the statute required that they leave *less than 2%* of their coal in place, *only 75%* of their underground coal could be profitably mined *in any event*. *Id.* at 495-96. Thus, the *Keystone* majority found no evidence of any material effect on the petitioners' investment-backed expectations, and accordingly held that they had not been denied economically viable use of their properties. *Id.* at 495-96, 499.[29]

Penn Central Transp. Co. v. *New York City*, 438 U.S. 104 (1978), was also a distinctly different case than the one at bar. Under the facts in *Penn Central*, this Court held that no taking had occurred by the landmarking of Grand Central Terminal un-

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[28] By way of illustration, the nuisance exception has been applied to deny compensation for the diminution or destruction of value of such property as hazardous waste operations, brothels, unsafe buildings, fire and health hazards, gambling facilities, and "bawdyhouses." *See Keystone*, 480 U.S. at 492 n.22 (citations omitted). So far as Seawall is aware, real estate development has not yet been legislatively declared an illegal or noxious use.

[29] In the words of one commentator, "[i]n *Keystone*, the companies *conceded* that they had been operating profitably for twenty years under the regulations and that no individual mine was rendered unprofitable by the regulation. The High Court was thus unmoved by their asserted plight . . . . " Berger, *supra*, at 738.

der its regulatory taking test, primarily because the owners' existing use of the property was still economically viable (although less profitable than it would have been under their unsuccessful proposal to build a high-rise office building in the air space above the terminal), and the denial of permission by the City to build the office building *did not interfere with the owners' primary expectation of using the land as a railroad terminal*. *See id.* at 136-38. It was highly significant in *Penn Central* that the owners did not dispute the finding that they *could* in fact earn a "reasonable return" on their investment in the Terminal based on the land's existing use. *Id.* at 129 n.26. This distinction is critical to this Court's conclusion in *Penn Central* that the Landmarks Law did not result in a compensable taking, where it "not only permit[ted] but contemplate[d] that appellants [could] continue to use the property precisely as it ha[d] been used for the past 65 years . . . ." *Id.* at 136.[30] Moreover, unlike Local Law 9, the ordinance in *Penn Central* gave the property owners valuable transferable development rights, which they could use on other property or sell to others, in exchange for the development rights it "took" from them. *Id.* at 129.

Finally, the Court of Appeals' holding that the burdens imposed on respondents by Local Law 9 do not substantially advance legitimate state interests was not only consistent with, but was *required by*, this Court's decision in *Nollan*, 483 U.S. at 825.

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[30] In light of the Terminal owners' concession that they were still able to make a reasonable return on their investment in the property, this Court's conclusion that the continuation of their present use left them with an economically viable property made sense in the *Penn Central* context. It does *not* make sense here, on the other hand, to reason, as petitioners do, that respondents have *ipso facto not* been deprived of economic viability because they are free to "continue" to use their properties as SROs, a use chosen and carried out in the past (unprofitably, *see* R. 708; SR-590) by *others*, and not, as in *Penn Central*, their own chosen and profitable long-standing use of the property. Furthermore, the Blackburn Report *itself* (the basis for all of Local Law 9's "findings of fact"), found that *SROs are not an economically rational use of valuable land* in midtown Manhattan (R. 732), due to, *inter alia*, City-wide market forces creating a rapid rise in the value of such real estate and making the only economically *rational* uses thereof dependent upon conversion or demolition of these buildings.

Clearly, "*Nollan* calls into question the legal propriety of shifting the burden of the cost of [a needed] public benefit to the 'last guy on the block' with a perceived deep pocket." Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California*, 39 Hastings L. J. 359, 393 (1988).

This Court's opinion in *Nollan* proceeds from a recognition of the constitutional necessity of a substantial cause-and-effect "nexus" between the harmful impacts *created by* the development project being regulated, and the exactions or burdens being imposed thereon by the government regulators. *See Nollan*, 483 U.S. at 836-37.[31] After *Nollan*, a heightened scrutiny of land use regulation is required, and in order to survive a Fifth Amendment taking challenge, an exaction must be *directly* related to amelioration of the adverse impact of the owner's proposed project and, moreover, "the adverse impact must be such that the regulator could have denied the permit outright." Berger, *supra*, at 751. In the words of the Court of Appeals, under *Nollan*, "the stark alternatives offered [to respondents] by Local Law No. 9—either submit to an uncompensated and, therefore, unconstitutional appropriation of your properties or pay the price (in cash or in replacement units)—amount to just the sort of exaction which could be classified, not as a valid regulation of land use but, 'an out-and-out plan of extortion.' " (A-55-56, quoting *Nollan*, 483 U.S. at 837 (citation omitted).)

Although petitioners attempt to say that respondents' redevelopment of their SRO properties will "cause" homelessness (*see, e.g.*, City's Petition at 17, asserting that the law "alleviat[es] the harm [respondents'] development does to the people of New York City"), it is now clear that simply saying so is not enough to pass constitutional muster. As this Court declared in *Nollan*,

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[31] This theory is further elaborated upon in an extremely pertinent factual context in Justice Scalia's subsequent *Pennell* dissenting opinion. *See* 108 S. Ct. at 862-64.

"[w]e view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." 483 U.S. at 841. It is plain that the requisite causal nexus is lacking in this case, and that respondents have been unfairly forced to bear public burdens, not of their creation, by Local Law 9.

The City itself acknowledges that the decline in the number of SRO units in New York "may be attributed to previous City policies which reflected the then wide-spread opinion that such units were 'substandard' and resulted in legal restrictions on the development of new SRO units (*see* Administrative Code § 27-2077)", (R. 177), as well as encouraging the destruction of existing SROs through tax incentives and other means. (*See* City's Petition at 3.) Indeed, it might well be concluded that respondents can more fairly be said to be *eliminating* a "noxious use" of property by their plans to replace the antiquated and largely uninhabitable former SRO buildings on their properties with modern, useful, commercial and residential developments than they are in any way initiating one.[32]

Moreover, contrary to petitioners' assertions, Local Law 9 is *not* necessary to protect any current SRO tenants from homelessness or from harassment. As petitioners are well aware, other New York laws exist to protect tenants against unlawful eviction practices. *See Sadowsky* v. *City of N.Y.*, 732 F.2d 312 (2d Cir. 1984) (upholding the City's SRO anti-harassment law). Respondents are obligated by existing rent control and rent stabilization laws,

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[32] The ultimately detrimental effect of the land use policy of Local Law 9 on City welfare is plain: the benefits to the City's real estate tax base which would flow from the hundreds of millions of dollars of commercial and residential redevelopment which Local Law 9 would prevent would clearly seem to outweigh the benefits of the relatively few SRO units preserved by the law. It is respectfully suggested that an alternative program which would permit the development of City real estate to its highest and best use, while earmarking the increased property taxes derived from such improvements for housing the homeless, would surely provide the financial underpinnings for a more rational and comprehensive City housing policy. (*See* R. 573.)

in the event they seek to vacate their buildings, to negotiate relocation agreements with such tenants (which will involve substantial and profitable compensation to those individuals). Thus, if the goal of Local Law 9 is, as the City claims, to *prevent* current tenants from becoming homeless, no adequate nexus can be shown between its means and its ends.

In addition, to the extent the City's goal is to increase the availability of affordable housing stock, the "logic" underlying Local Law 9 is revealed to be insupportable: if the City exacts so large an amount in exchange for allowing owners to redevelop their properties[33] that the owner cannot afford to pay, new development (including new *residential* development) becomes highly unlikely; and if the owner submits and *makes* the extortionate payment, not only does the City get a windfall, but, if the contemplated development is residential, the cost of available housing in the City will predictably increase.[34] On the other hand, to the extent the City's goal is to "preserve" existing SRO units affordable to the indigent population which has historically inhabited such "bottom-rung" housing, Local Law 9 doesn't effectively address that problem *either*—under the law's provisions, respondents could "rent-up" their units to *anyone*[35] or they could "replace"

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[33] In Seawall's case for example, the cost of "buying-out" its buildings from under the yoke of Local Law 9 (at $45,000 per unit, *see* N.Y.C. Admin. Code §§ 27-198.2(d)(4)(a)(i) and 27-198.2(h)) would be approximately $5 million, an exorbitant amount by any standard. It is worth repeating here that, even with this enormous buy-out, Seawall would still not be free to evict its few current tenants, who are protected from eviction by other laws. Moreover, the exercise of the "option" to "buy-out" could nevertheless leave it in circumstances where such tenants refuse to negotiate relocation agreements, and Seawall is forced to maintain those units in perpetuity.

[34] It has been estimated that as much as 30% of the current cost of housing is directly attributable to land-use regulation. *See* Case & Gale, *Henry George Wouldn't Be Big On Today's Growth Controls*, Wall St. J., Mar. 3, 1988, §1, at 18.

[35] The City *itself* acknowledges that "these units will not have to be rented to homeless persons or to individuals of any particular social or economic status." (R. 449; *see* A-47-48.)

their units with non-SRO housing "affordable" to persons of "*moderate*" income. (N.Y.C. Admin. Code § 27-198.2(d)(4)(a)(ii); R. 153-54.) If they pay the $45,000 per unit ransom under the buy-out provisions, the Local Law provides that the City will use these funds "for the preservation . . . of *dwelling units* for persons of low and *moderate income*" (N.Y.C. Admin. Code § 27-198.2(i); R. 156-57) (emphasis added). In sum, the Court of Appeals correctly held that Local Law 9 fails to meet *Nollan's* requirement of a close nexus between the "means" and "ends" of a challenged land-use regulation.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the briefs of co-respondents, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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